Supreme Court of the United States

OCTOBER TERM, 1954

No. 250

ANTHONY TONY SICURELLA,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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TO THE SUPREME COURT OF THE UNITED STATES:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, affirming the judgment of the United States District Court for the Northern District of Illinois, Eastern Division, convicting the petitioner of a violation of the Universal Military Training and Service Act and sentencing him to the custody of the Attorney General.

OPINION BELOW

The opinion of the Court of Appeals is not yet reported. It is printed as Appendix A to this petition. The opinion

of the Court of Appeals in the companion case of *United States* v. *Simmons,* referred to in the opinion in this case by the Court of Appeals is an appendix to the petition in the companion petition, *Simmons* v. *United States.*

JURISDICTION

The judgment of the Court of Appeals was entered on June 15, 1954. The time for filing this petition for writ of certiorari has been extended to August 14, 1954. This petition for writ of certiorari is filed within the extended time. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1). See also Rules 37(b)(2) and 45(a), Federal Rules of Criminal Procedure. The district court has jurisdiction under 18 U. S. C. § 3231.

QUESTIONS PRESENTED

I.

The undisputed evidence showed that petitioner had conscientious objections to participation in both combatant and noncombatant military service. He showed that these objections were based on his sincere belief in the Supreme Being. The file established without dispute that his obligations were superior to those owed to the state or which arose from any human relation. There was no showing that these beliefs flowed from any political, philosophical or sociological views. The undisputed evidence showed that the objections were based solidly on the Word of God and the obligations that Sicurella had to the Supreme Being.

The question here presented, therefore, is whether the denial of the claim for classification of petitioner by the appeal board as a conscientious objector was without basis in fact and, consequently, the final I-A classification was arbitrary and capricious.

II.

Section 6(j) of the act and Section 1626.25 of the Se-

lective Service Regulations provide for the reference of the conscientious objector claim to the Department of Justice for appropriate inquiry and hearing. This is followed by a recommendation by the department to the appeal board on the conscientious objector claim. Petitioner had a hearing, after inquiry, that was followed by a report of the hearing officer to the Department of Justice and a recommendation to the Assistant Attorney General to the appeal board. The hearing officer of the Department found petitioner to be a sincere and bona fide conscientious objector, but the Assistant Attorney General recommended against the conscientious objector status. The draft board file of petitioner showed that while he was conscientiously opposed to direct participation in the armed forces he was willing to defend himself and his Christian brothers, Jehovah's Witnesses.

While the Department of Justice hearing officer did not place any weight on his willingness to defend himself the Assistant Attorney General in his recommendation to the appeal board did consider this as a basis for the denial of the conscientious objector status. The Court of Appeals held that there was basis in fact for a denial of the conscientious objector status also for this reason stated by the Assistant Attorney General in his memorandum. The Court of Appeals held that because petitioner was willing to defend himself and his brothers he was not a conscientious objector.

A question presented, therefore, is whether the act and the regulations permit the Department of Justice to recommend to the appeal board to deny, and may the appeal board deny, the conscientious objector status because the petitioner, an objector to direct participation in the armed forces, is willing to defend himself and his brothers by the use of force.

STATUTES AND REGULATIONS INVOLVED

Section 1(c) of the Universal Military Training and Service Act (50 U. S. C. App. (Supp. V) § 451(c)) is involved. Also Section 6(j) of the act must be considered (50 U. S. C. App. (Supp. V) § 456(j), 65 Stat. 75, 83, 86). See also Section 12(a) of the act (50 U. S. C. App. (Supp. V) § 462(a)).

Sections 1622.14, 1626.25 and 1626.26 of the regulations (32 C. F. R. §§ 1622.14, 1626.25 and 1626.26) are involved.

These are extensive provisions. They are printed as Appendix B at the end of this petition, pages 23-28.

STATEMENT OF THE CASE

The Facts

Petitioner was born on June 13, 1927. [51, 53][1] He registered with his local board on September 11, 1948. [52, 53] The local board mailed to him the classification questionnaire. [54-55] On January 15, 1945, Sicurella returned his questionnaire properly filled out and filed it with the local board. He identified himself by giving his name and address. He then showed that he was a minister of religion. He answered that he regularly served as such. He then said that he had been a minister of Jehovah's Witnesses since 1934. He added that he was formally ordained in January of 1944 in Chicago. [55-56]

He answered that he was a student preparing for the ministry also. [56] At the trial he explained in his testimony that while he was a minister he continued to attend school and study Bible courses so that he could keep up to date. He said this was the reason he answered that he was a student of the ministry. [43]

In the questionnaire Sicurella also showed that he was a clerk for the Railway Express Agency. [56-57]

[1] Numbers appearing herein within brackets refer to pages of the printed record in this case.

He showed that he worked 44 hours per week in this job. [56-57]

Sicurella showed that he had attended eight years of elementary school. He also attended two years of junior high school and two years of high school, having graduated. [57] Sicurella failed to sign the conscientious objector blank appearing in the questionnaire. [57] At the trial he explained to the court the reason why he had failed to sign the conscientious objector blank. He said that he thought that according to law he had to "claim either IV-D or I-O, so I claimed the more important one to me that of IV-D." [19]

In the conclusion of his classification questionnaire Sicurella claimed classification in Class IV-D, the minister's exemption provided for in the regulations. [58] The local board on March 1, 1949, recognized his claim for exemption as a minister of religion. The board placed him in Class IV-D. [58] He was notified of this. [58]

The local board on September 20, 1950, notified Sicurella to appear for hearing on September 26, 1950. The memorandum made by the local board on the date he was notified shows that the board wrote to State Headquarters "for law on the Jehovah's Witnesses before the board will act." [58] The local board on October 9, 1950, placed Sicurella in Class I-A. [58] He was notified of this. [58] Sicurella requested a personal appearance on October 16, 1950. [62-63] He also filed with the local board on the same date affidavits and certificates showing that he was pursuing the ministry and as a basis for his ministerial activity he was entitled to the exemption. [60-62]

Sicurella on October 17, 1950, called the board about the hearing. The local board then on November 3, 1950, notified him to appear before it with evidence on November 8.[59] On November 8, 1950, Sicurella filed with the local board a list of scriptures showing that he had conscientious objections to war. He also filed petitions and certificates as to his ministerial status. [64-65] The local board on November 8, 1950, classified Sicurella in Class I-A. This made him liable

for unlimited military training and service. [59] He was notified of this classification. [59]

Sicurella wrote the board a letter of appeal on November 11, 1953. In this letter of appeal he requested another personal appearance. [66] The local board notified him. They told him he was not entitled to another personal appearance. [67] The board then notified him to report for preinduction physical examination on November 27, 1950. [67-68] He was declared to be physically acceptable for training and service. [59, 60] He was notified of his acceptability by the local board on December 8, 1950. [59, 70]

Sicurella, on December 10, 1950, filed with the local board a letter showing his Scriptural argument and basis for his conscientious objections to combatant and noncombatant military service. [69-70]

The appeal board on January 17, 1951, classed Sicurella for unlimited military training and service in the armed forces. He was placed in Class I-A. [59] The file was returned to the local board and he was notified of this classification. [59] Sicurella on January 26, 1951, requested a personal appearance. He again stated that he was a conscientious objector. [72, 73, 74]

On January 31, 1951, the local board wrote Sicurella and told him that there would be no personal appearance granted to him. [74] On February 5, 1951, Sicurella notified the local board that he was appealing to General Hershey for relief against the actions taken by the board. [75]

Sicurella, on February 9, 1951, filed with the local board a conscientious objector form that he had requested on February 5, 1951. [59, 76] In the conscientious objector form he signed Series I(B). In this he certified that he was conscientiously opposed to both combatant and noncombatant military service. [76] Sicurella showed he believed in the Supreme Being. [76] He described the nature of his beliefs as a conscientious objector. He showed that he was in the army of Christ Jesus. He emphasized that the weapons of his warfare were spiritual and not carnal. He told the board

that he believed in rendering unto Caesar the things that are Caesar's. He added, however, that he did not believe in rendering unto Caesar the things that belonged to God. [76-77, 81-82]

Sicurella showed the local board that he got his conscientious objections from a deep and serious study of the Bible. [77]

Sicurella answered that he relied on the Bible and the Watchtower Bible and Tract Society for religious guidance and instruction. [77] In answer to the question as to whether he believed in the use of force he stated that he believed in using force only to the extent of defending the Kingdom interests. This included self-defense and the defense of his brothers. He certified that he did not use weapons and if necessary he would retreat when attacked in order to avoid trouble. [77-82]

Sicurella stated that the behavior and the conduct of his life which consistently demonstrated the depth of his conviction was that he had been preaching the gospel of Jehovah's Witnesses since he was six years old. He indicated that he preached publicly and from house to house. He otherwise showed that he had pursued a consistent course of action as one of Jehovah's Witnesses since childhood. [77-78]

Sicurella showed that he had publicly expressed his stand as a Christian minister and as a conscientious objector when he was baptized. He indicated that from the Bible he believed that the Kingdom of Almighty God was not of this world. He showed that he must maintain strict neutrality and that he had expressed himself on this view. [78, 82]

Sicurella then listed the schools he had attended, the jobs at which he had been employed, and the addresses of the places where he had lived. [78-79] He showed that his parents were Jehovah's Witnesses. [79] He answered that he had never been a part of any military organization. [79]

Sicurella showed that he was a member of a religious organization. He showed that this was Jehovah's Witnesses

and that the legal governing body of that group was the Watchtower Bible and Tract Society. He answered that he had been brought up in the faith of Jehovah's Witnesses. He showed the address of his church and named the presiding minister. [80] He described the creed of Jehovah's Witnesses in opposition to participation in war. He showed that they believed that the Kingdom of Almighty God was not of this world. He certified that they were neutral to the conflicts of this world. [80] He said that he was an ordained minister of religion preaching the gospel of God's Kingdom. [80]

Sicurella concluded his conscientious objector form by giving references to persons who would vouch for his sincerity. He then signed the form. [80-81]

When the conscientious objector form was filed with the local board the local board did not reopen his case and reconsider it, as required by law. The board forwarded the file on February 16, 1951, to the State Director for his review. [59] The State Director, on February 21, 1951, wrote the local board that it should reopen and reconsider his case. He also informed the board that it would be necessary to consider the claim of Sicurella as a minister of religion and as a conscientious objector. [83-84]

The local board, on reopening and reconsidering his case, classed Sicurella in Class IV-D. This exempted him for the second time as a minister of religion. This was on March 12, 1951. [59] He was notified of this classification. [59]

Sicurella stayed in this exempt status until March, 1952. The local board, on March 10, 1952, forwarded his file to the State Headquarters for review. [59, 84-85] The State Headquarters reviewed his file and advised the board that in the opinion of the State Director Sicurella did not qualify for the ministerial exemption or Class IV-D. [85-86] The local board then on March 17 classified him in Class I-A and he was later notified of this classification. [59]

Sicurella on March 24 wrote a letter to the local board

requesting a personal appearance. [59, 86-87] The local board then notified him to appear before it on April 7. [59, 87] On April 7, following personal appearance, the local board classified Sicurella again as liable for unlimited military service. He was placed in Class I-A. He was then notified of this classification. [59]

Sicurella then took an appeal to the appeal board on April 18, 1952. [59, 88-89] On that date his file was forwarded to the appeal board. [59, 89] The appeal board then placed Sicurella in Class I-A on May 21, 1952. [59, 90] The file was returned to the local board and Sicurella was notified of the I-A classification by the appeal board on May 23, 1952. [59]

The State Director was written a letter dated May 31, 1952, by Sicurella. He complained of the action by the appeal board. He charged that he had been illegally dealt with by the boards. [90-91] The State Director wrote Sicurella that it was up to the local board to classify him. [92] The file was called in to State Headquarters, however, by the State Director for study and review. [60, 93-94]

The State Director then wrote a letter to the local board calling attention to the fact that Sicurella's procedural rights on personal appearance had been violated by the board. [94-95]

The local board wrote Sicurella to appear before it on July 14, 1952. [60, 95-96] Sicurella appeared before the local board on July 14. [60] The personal appearance was very summary in nature. It was brief. Very few questions were asked. An extremely short memorandum of the personal appearance was made by the local board. The testimony showed that one of the board members stated to Sicurella that they knew he was a minister of religion but that they were not able to classify him as a minister because it was over their head. Apparently the board member was referring to the earlier letter from the State Director giving opinion that Sicurella was not entitled to the minister's exemption. [24]

The trial court excluded testimony offered by the defendant to show prejudice of the board members against Jehovah's Witnesses and a denial of the claim for exemption by determining on a class basis that Jehovah's Witnesses are not ministers rather than considering *de novo* the particular claim of Sicurella. Offers of proof were made showing what the testimony would have been had it been admitted. [22-23, 46-47, 49-50]

The memorandum made by the local board following the personal appearance merely showed that Sicurella was ordained in February of 1943 by his congregation. It stated that he held services in the church twice a month and referred to the basis for the claim for classification as a minister of religion. [96]

The local board, following the personal appearance, on July 14, 1952, classified Sicurella in Class I-A. It notified him of the classification. [60] Sicurella then on July 21, 1952, appealed his classification. [97] There was an FBI investigation on his claim for classification as a conscientious objector. This investigation preceded a hearing in the Department of Justice before the hearing officer. The hearing officer notified Sicurella to appear before him on January 13, 1953, for a hearing. [26] Sicurella appeared for the hearing as notified by the officer. [26] He brought along with him to the hearing twelve witnesses to vouch for his sincerity and good faith in making his claim for classification as a conscientious objector. [26]

At the personal appearance before the hearing officer Sicurella asked the hearing officer for the FBI report. The hearing officer said that there was no use in showing it to him because it was favorable to Sicurella. [26] Sicurella then asked the hearing officer, Roy West, to please give him a summary of the unfavorable evidence in the FBI report. The hearing officer then replied: "There is no use in telling you because it was favorable." [26] At the close of the hearing, Hearing Officer West told Sicurella that he believed he was a sincere conscientious objector. He stated that he

would recommend favorably to the Department of Justice and suggest that Sicurella be classified as a conscientious objector. [27]

The file and the report of the hearing officer were sent in to the Department of Justice at Washington. The Assistant Attorney General reviewed the case and the report of the hearing officer. [99-101] The Assistant Attorney General, after stating the history of Sicurella's case, referred to the recommendation of the hearing officer. He said that the hearing officer was convinced that Sicurella was sincere and that his conscientious objections were based on religious training and belief. He stated that the hearing officer recommended the conscientious objector classification to be given to the defendant. [100-101]

The Assistant Attorney General did not follow the recommendation of the hearing officer. He did not reject the report of the hearing officer because Sicurella was not sincere. The Assistant Attorney General recognized that Sicurella was sincere. He recommended against Sicurella because he "failed to establish that he is opposed to war in any form." The Assistant Attorney General noted that Sicurella would defend himself, his ministry and his fellow brothers. The Assistant Attorney General held that because Sicurella would exercise his legal and Biblical right of self-defense he was not entitled to the conscientious objector exemption "within the meaning of the act." [101] The Assistant Attorney General then recommended to the appeal board that the claim for classification as a conscientious objector "be not sustained." [101]

The appeal board, on February 10, 1953, classified Sicurella in Class I-A. [101-102] The file was returned to the local board and Sicurella was notified of the classification that made him liable for military training and service and denied his claim for exemption. [60] On February 19, 1953, Sicurella was ordered to report for induction on March 5, 1953. [60, 102-103] He reported on that date but refused to submit to induction. [54, 104-105, 106]

FORM AND HISTORY OF ACTION
SHOWING JURISDICTION IN DISTRICT COURT

This criminal action was brought by indictment charging petitioner with a violation of the Universal Military Training and Service Act (50 U. S. C. App. (Supp. V.) §§ 451-470). Petitioner was charged with failing and refusing to submit to induction contrary to the act. The indictment was filed on April 17, 1953. [1, 2, 5] The petitioner pleaded not guilty on June 2, 1953.

The case proceeded to trial before the judge without a jury, which was waived. [1-2, 16] At the close of all the evidence the petitioner made his motion for judgment of acquittal. [3, 11-14] The motion for judgment of acquittal was denied. [3, 15-16] On September 23, 1953, the court found the petitioner guilty and sentenced him to the custody of the Attorney General for a period of two years. [15-16] A notice of appeal was timely filed with the trial court. Statement of points was duly filed in the court below. [106-108]

REASONS FOR GRANTING THE WRIT

I.

Reliance upon the willingness of petitioner to use force to defend his life as basis in fact by the Court of Appeals is in direct conflict with *Annett* v. *United States*, 205 F. 2d 689 (10th Cir. June 26, 1953); *Taffs* v. *United States*, 208 F. 2d 329 (8th Cir. Dec. 7, 1953), certiorari denied 74 S. Ct. 532 (March 15, 1954); and *United States* v. *Pekarski*, 207 F. 2d 930 (2d Cir. Oct. 23, 1953); all holding that willingness to use force in self-defense or in defense of one's church is no basis in fact for a denial of the conscientious objector status. (See the opinion of Mr. Justice Douglas in granting bail on December 10, 1953, in *Clark* v. *United States*, 74 S. Ct. 357, 98 L. Ed. 171.) Because of this direct conflict on the same matter by the court below and the other courts of appeal, the Court should grant certiorari to settle the conflict.

Before concluding the discussion under this section of the discussion on the reasons for granting the writ it is important to call to the attention of the Court what the Acting Solicitor General said in his petition for writ of certiorari in *Taffs* v. *United States*, No. 576, October Term, 1953, at page 11:

> "We do not here seek review of the holding of the court below that the expressed willingness of the registrant and other Jehovah's Witnesses to use force, even to the extent of killing, in self-defense or in defense of home, family, or associates, does not of itself exclude them from the classification of conscientious objectors. The Department of Justice in its instructions to hearing officers for conscientious objector cases has taken the same position. See Appendix B, *infra*, pp. 20-24. See *Annett* v. *United States*, 205 F. 2d 689 (C. A. 10). Nor do we seek review of the determination that this particular registrant was sincere in the beliefs expressed by him and a *bona fide* member of Jehovah's Witnesses."

The court below also made a decision directly in conflict with a decision rendered by it just five days before the decision was handed down in this case. That was in the case of *United States* v. *Close*, No. 11,085, decided on June 10, 1954. In that case the court below said:

> "It is clear from the letter written by the Special Assistant of the Attorney General to the appeal board that his legal opinion that the defendant was not entitled to a conscientious objector classification was based on the belief that the defendant, as a member of Jehovah's Witnesses, was not a pacifist, was not opposed to participation in theocratic wars, and was not opposed to fighting in self-defense and, therefore, was not 'opposed to participation in war in any form,' as that phrase

is used in Section 6(j) of the Act. Many recent decisions have held that such an interpretation of this section of the Act is erroneous. *Annett* v. *United States*, 10 Cir., 205 F. 2d 689; *United States* v. *Pekarski*, 2 Cir., 207 F. 2d 930; *Taffs* v. *United States*, 8 Cir., 208 F. 2d 329; *United States* v. *Hartman*, 2 Cir., 209 F. 2d 366, 370; *Jessen* v. *United States*, 10 Cir., — F. 2d — (May 7, 1954); *United States* v. *Hagaman*, 3 Cir., — F. 2d — (May 13, 1954). As to this contention, the court said in the *Taffs* case, *supra*, page 331: 'However, we are inclined to think that Congress did not intend such an unreasonable construction to be placed on this phrase. War, as we know it, and as the term is ordinarily used, means a flesh and blood conflict between nations; it is a struggle of violence by one political entity seeking to overcome or overthrow another political entity. Manifestly, Congress was legislating in regard to this type of conflict and was not, indeed, could not, concern itself with theocratic wars—that is, wars carried on by the immediate direction of God. The words "in any form," obviously relate, not to "war" but to "participation in" war. * * * '

"Since the final I-A classification of the defendant was based on this erroneous construction of the statute, the classification was invalid and did not require the defendant to submit to induction. The defendant's motion for acquittal should have been granted."

See also *United States* v. *Wilson*, 7th Cir., July 15, 1954, — F. 2d —.

It is submitted that there is direct conflict on the same matter by the court below and several other courts of appeals. This conflict gives a ground for the granting of certiorari here to settle the conflict. This is a substantial and

an important question of law that has not been determined but which ought to be decided by this Court.

II.

The decision of the court below is in direct conflict with the holdings in other cases decided by other courts of appeal. In those cases the appellants, like petitioner here, were Jehovah's Witnesses. They showed the same religious belief, the same objection to service and the same religious training. While different speculations were relied upon by the Government which were discussed and rejected by the courts in those cases, the courts were also called upon to say, on facts identical to the facts in this case, whether there was basis in fact. For instance, see *Jessen* where the Tenth Circuit (after following *Taffs* v. *United States,* 8th Cir., Dec. 7, 1953, 208 F. 2d 329) said: "The remaining question is whether there was any basis in fact for the classification made by the State Appeal Board."

The holdings of other circuits with which the holding of the court below (that there was basis in fact for the denial of the classification) directly conflicts are: *Annett* v. *United States,* 10th Cir., June 26, 1953, 205 F. 2d 689; *United States* v. *Pekarski,* 2d Cir., Oct. 23, 1953, 207 F. 2d 930; *Taffs* v. *United States,* 8th Cir., Dec. 7, 1953, 208 F. 2d 329; *Jewell* v. *United States,* 6th Cir., Dec. 22, 1953, 208 F. 2d 770; *Schuman* v. *United States,* 9th Cir., Dec. 21, 1953, 208 F. 2d 801; *United States* v. *Hartman,* 2d Cir., Jan. 8, 1954, 209 F. 2d 366; *Pine* v. *United States,* 4th Cir., April 5, 1954, 212 F. 2d 93; *Jessen* v. *United States,* 10th Cir., May 7, 1954, — F. 2d —; *United States* v. *Close,* 7th Cir., June 10, 1954, — F. 2d —. And these cases ought not to be pushed aside on the specious but factitious ground that, because the courts in some of those cases discussed the speculations urged on the courts as basis in fact, the cases are different. They are not different because on the question of whether or not there was basis in fact the evidence in each case is identical to the facts in this case and the holdings were the opposite to that

made by the court below in this case. Such attempted distinction would be a distinction without a difference. The cases above cited are identical to the facts in this case insofar as the statements in the draft board record showing conscientious objection are concerned.

It is submitted, therefore, that there is a direct conflict between the holding of the court below and the holding of other courts of appeals on this question. This gives a basis for granting the writ of certiorari.

III.

Should this Court not find a conflict in the decision below and those of the other courts of appeals cited, petitioner says that the question is an important question of federal law that has not been, but which should be, decided by this Court.

The act deals with participation in combatant and noncombatant training and service. It is proof of willingness to do military training and service that justifies a forfeiture of the claim for classification as a conscientious objector. Self-defense is permitted under the law of God and the law of man. It is a universal right that is accorded to the individual in any government. Congress did not intend to forfeit the right to self-defense at the cost of being a conscientious objector. By force of the same reason the Congress did not intend to declare that one was willing to defend himself loses his conscientious objections to the performance of military service.

No relevance or materiality exists between conscientious objection and self-defense. There is as much difference between willingness to use force in self-defense and willingness to participate in combatant and noncombatant military training and service as there is between day and night. Willingness to fight in self-defense, therefore, is no basis in fact for the denial of the conscientious objector status when that exemption from military service is established by other evidence in the file, as in this case.

IV.

The court below held that the recommendation of the Department of Justice to the appeal board is harmless in this case because it is advisory. The court overlooked the fact that the recommendation was accepted and acted upon. The appeal board followed the recommendation and denied the conscientious objector status. When it did this it made the recommendation a link in the chain. With such a defective link in the chain of administrative proceedings the entire chain is void. *United States* v. *Romano*, S. D. N. Y., 1952, 105 F. Supp. 597; *United States* v. *Everngam*, D. W. Va., 1951, 102 F. Supp. 128; *Annett* v. *United States*, 10th Cir., June 26, 1953, 205 F. 2d 689; *United States* v. *Close*, 7th Cir., June 10, 1954, — F. 2d —; *Taffs* v. *United States*, 8th Cir., Dec. 7, 1953, 208 F. 2d 329; *Jessen* v. *United States*, 10th Cir., May 7, 1954, — F. 2d —. There is, therefore, prejudicial error in the making of the recommendation by the Department of Justice to the appeal board in this case.

CONCLUSION

For the reasons above stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

HAYDEN C. COVINGTON

Counsel for Petitioner

July, 1954.

APPENDIX A

IN THE

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 11012 OCTOBER TERM, 1953, APRIL SESSION, 1954.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

ANTHONY TONY SICURELLA,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

June 15, 1954.

Before MAJOR, *Chief Judge,* DUFFY and LINDLEY, *Circuit Judges.*

LINDLEY, *Circuit Judge.* This appeal is companion to *United States* v. *Robert Simmons,* No. 11011. Although the cases were combined for oral argument, separate opinions seem desirable for purposes of clarity.

The appeal is taken from a judgment of conviction of refusing to submit to induction into the armed forces in violation of 50 App. U. S. C. Sec. 462. In his questionnaire appellant stated that he was an ordained minister of Jehovah's Witnesses and a student at a ministry school operated by that sect. He asserted a right to a IV-D, minister of religion classification. This claim was ultimately denied by the selective service authorities and is not in issue before us.

In his questionnaire appellant asserted no claim to con-

scientious objector status. After denial of his ministerial claim, he filed an application for a I-O, conscientious objector classification, in which he asserted that by reason of his religious training and belief he was conscientiously opposed to participation in war in any form. He was granted a hearing on this claim by his local board, which classified him I-A. Appellant took an appeal from this classification to the state appeal board. His file was referred by the appeal board to the Department of Justice for its investigation and recommendation. An investigation was conducted by the FBI. A hearing was held before a Department hearing officer at which appellant appeared, together with a number of witnesses in his behalf. At his trial he testified that he asked the hearing officer for a summary of the adverse evidence contained in his FBI file. He quoted the hearing officer as answering, "There is no use telling you, because it is favorable." The hearing officer recommended to the Department that his claim be sustained. Because appellant had expressed a willingness to use force in defense of "Kingdom Interests", and therefore was not opposed to war in any form, the Department of Justice in its report recommended to the appeal board that his claim be denied and that he be classified I-A.

The appeal board classified him I-A and the induction order followed. Appellant admits that he refused to submit to induction when ordered to do so, but contends that the order is void, averring that there is no basis in fact for denying his conscientious objector claim and that he was denied due process of law in certain stages of the classification process to be subsequently related.

We have previously outlined the principles guiding our determination of the basis in fact question in the opinion in *United States v. Simmons*. Applying those principles, on the record before us we cannot say that the appeal board's denial of appellant's claim was without basis in fact. The question whether a belief in the use of force in

self-defense and in theocratic warfare is incompatible with a claim of conscientious objection has been considered by the courts of several circuits. In *United States* v. *Dal Santo*, 205 F. 2d 429, 433, cert. denied 346 U. S. 858, we expressed the view that a denial of a conscientious objector classification solely on the basis that, "believing in self-defense," a registrant "could not qualify as a conscientious objector" would, at most constitute an erroneous classification which would be final and not subject to correction by judicial review. In *Annett* v. *United States*, 205 F. 2d 689, the Court of Appeals for the Tenth Circuit, one judge dissenting, held void a classification denying Annett's claim to conscientious objector status which the court found was based solely on the defendant's expressed belief in the use of force in self-defense. This decision has been followed in *United States* v. *Taffs*, 208 F. 2d 329, cert. denied 347 U. S. 928 (C. A. 8); *United States* v. *Hartman*, 209 F. 2d 366 (C. A. 2); and *United States* v. *Pekarski*, 207 F. 2d 930 (C. A. 2).

In view of the most recent pronouncement by the Supreme Court in *Dickinson* v. *United States*, 346 U. S. 389, 396, that courts may not apply "a test of 'substantial evidence'" to this type of case, it would appear that the cases last cited rest on an incorrect theory of the scope of judicial review, thus rendering their authoritative value speculative. The majority of the court in the *Annett* case treated the expression of belief in the use of force for limited purposes as evidentiary but reversed Annett's conviction because of a "lack of any substantial evidence" to support the board's denial of his conscientious objector claim. The court in the *Pekarski* case reiterated this test in holding a classification order void because supported by "no substantial evidence." The courts in the *Hartman* and *Taffs* cases based their decisions solely on the basis of the majority opinion in *Annett* without the benefit of any discussion of the merits of that decision.

We think that this court, speaking through Judge Duffy, expressed the correct view in the *Dal Santo* case. Whether or not appellant's willingness to use force in defense of "Kingdom Interests" is incompatible with a claim of conscientious objection to participation in war, his statement is an appropriate factor for the board to consider when ruling on his claim as bearing on the question whether he has brought himself within the statutory privilege. Furthermore, this circumstance does not stand alone in the record before us. Statements made by appellant in his SSS Form 150 express an objection to any and all obedience to secular authority. Thus he stated that he is "no part of this world which is governed by political systems," that he conscientiously objects "to serving in any military establishment or any civilian arrangement that substitutes for military service" and that he "cannot desert the forces of Jehovah to assume the obligations of a soldier of this world without being guilty of desertion."

Two things are apparent on the face of these statements, *i.e.*, that appellant sets himself separate and apart from all other persons as immune from the constitutional dictates of the national government and that he is asserting a claim of exemption extending to both military and civilian service under the Act, a claim which goes beyond the statutory exemption. 50 App. U. S. C. Sec. 456 (j). These claims are consistent only with objections to any command of governmental authority, but do not *per se* establish that deep-seated conscientious belief which would entitle appellant to the claimed exemption. On this basis the board could conclude that appellant had not proved himself within the terms of the statutory privilege. Only the boards, local and appellate, are empowered to make that determination. We cannot say that the order here challenged is without a basis in fact.

Equally wanting in merit is appellant's contention that the order is tainted by fatal error on the part of the Department of Justice and therefore void. This contention is

twofold, viz., that the Department erred in rejecting the hearing officer's recommendation that appellant's claim be allowed and that the recommendation to the appeal board was based on an erroneous ground that a belief in the use of force under certain circumstances is incompatible with a claim of conscientious objection to war. Suffice it to state as to the former that the hearing officer's report is merely advisory and only one of the factors considered by the Department in framing its recommendation to the board. As to the latter, if we assume that the Department's recommendation to the appeal board was based on an erroneous ground, that report is advisory only and was, as we have previously indicated, predicated on an evidentiary factor competent for consideration by the appeal board, the body charged by the Act with the duty to make the determinative judgment on each appealing registrant's claim. 50 App. U. S. C. Sec. 456 (j); *United States* v. *Nugent,* 346 U. S. 1, 9.

For the reasons stated in *United States* v. *Simmons,* appellant's principal contentions must also fail. As did Simmons, appellant contended below that he was entitled as a matter of right to a full summary of the adverse evidence in his FBI file at the time of his Justice Department hearing and that, therefore, the file must be produced at his trial to enable the court to determine whether he was given this requisite summary. To this end he procured the issuance of a subpoena *duces tecum* to compel the production of the file at his trial. On the government's motion, the court below quashed the subpoena. This action is assigned as error. In view of what was said in the *Simmons* case, it is sufficient to state that no prejudice to appellant is shown on the face of the record.

Appellant testified that he was told by the hearing officer that the FBI report was favorable to his claim. The report of the Department of Justice to the appeal board states that the evidence in the file is favorable and that the Department placed no credence in an adverse

opinion by one person questioned by the FBI "who could offer no facts to substantiate" this opinion. The file was never before the appeal board; nothing before that body indicated that any adverse evidence was contained in it. This situation is essentially similar to that which the Supreme Court recited as refuting an alleged denial of the right to be advised of evidence adverse to the registrant's claim in *United States* v. *Packer* (*United States* v. *Nugent*), 346 U. S., at page 7, n. 10. Appellant could not have been prejudiced by adverse evidence, if any, contained in the secret file. That file was irrelevant to any issue before the court below and the court properly quashed the subpoena.

On the record before us we cannot say that the denial of appellant's claim was without basis in fact or that appellant was denied due process of law in any stage of the administrative process. The judgment is affirmed.

APPENDIX B

Statutes and Regulations Involved

Section 1(c) of the Universal Military Training and Service Act (50 U. S. C. App. (Supp. V) § 451(c)) provides:

"The Congress further declares that in a free society the obligations and privileges of serving in the armed forces and the reserve components thereof should be shared generally, in accordance with a system of selection which is fair and just, and which is consistent with the maintenance of an effective national economy."—June 24, 1948, ch. 625, title I, § 1, 62 Stat. 604, amended June 19, 1951, ch. 144, title I, § 1(a) 65 Stat. 75.

Section 6(j) of the act (50 U. S. C. App. (Supp. V) § 456(j), 65 Stat. 75, 83, 86) provides:

"Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by

reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the ar ed forces under this title, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title. Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing if the objections are found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed

forces under this title, he shall be assigned to noncombatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title. If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board. Each person whose claim for exemption from combatant training and service because of conscientious objections is sustained shall be listed by the local board on a register of conscientious objectors." —50 U. S. C. App. (Supp. V) § 456(j), 65 Stat. 75, 83, 86.

Section 12(a) of the act (50 U. S. C. App. (Supp. B) § 462(a)) provides:

"... Any ... person ... who ... refuses ... service in the armed forces ... or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title, or rules, regulations, or directions made pursuant to this title ... shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment ..."

Section 1622.14 of the Selective Service Regulations (32 C. F. R. § 1622.14 (1951 Rev.)) provides:

"*Conscientious objector available for civilian work contributing to the maintenance of the national health, safety, or interest.* (a) In Class I-O shall be placed every registrant who would have been classified in Class I-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to both combatant and noncombatant training and service in the armed forces."

Section 1626.25 of the Selective Service Regulations (32 C. F. R. § 1626.25 (1951 Rev.)) provides:

"*Special Provisions When Appeal Involves Claim That Registrant Is a Conscientious Objector.*—(a) If an appeal involves the question whether or not a registrant is entitled to be sustained in his claim that he is a conscientious objector, the appeal board shall take the following action:

"(1) If the registrant has claimed, by reason of religious training and belief, to be conscientiously opposed to participation in war in any form and by virtue thereof to be conscientiously opposed to combatant training and service in the armed forces, but not conscientiously opposed to noncombatant training and service in the armed forces, the appeal board shall first determine whether or not such registrant is eligible for classification in a class lower than Class I-A-O. If the appeal board determines that such registrant is eligible for classification in a class lower than I-A-O, it shall classify the registrant in that class. If the appeal board determines that such registrant is not eligible for classification in a class lower than Class I-A-O, but is eligible for classification in Class I-A-O, it shall classify the registrant in that class.

"(2) If the appeal board determines that such registrant is not eligible for classification in either a class lower than Class I-A-O or in Class I-A-O, the appeal board shall transmit the entire file to the United States Attorney for the judicial district in which the office of the appeal board

is located for the purpose of securing an advisory recommendation from the Department of Justice.

"(3) If the registrant claims that he is, by reason of religious training and belief, conscientiously opposed to participation in war in any form and to be conscientiously opposed to participation in both combatant and noncombatant training and service in the armed forces, the appeal board shall first determine whether or not the registrant is eligible for classification in a class lower than Class I-O. If the appeal board finds that the registrant is not eligible for classification in a class lower than Class I-O, but does find that the registrant is eligible for classification in Class I-O, it shall place him in that class.

"(4) If the appeal board determines that such registrant is not entitled to classification in either a class lower than Class I-O or in Class I-O, it shall transmit the entire file to the United States Attorney for the judicial district in which the office of the appeal board is located for the purpose of securing an advisory recommendation from the Department of Justice.

"(b) No registrant's file shall be forwarded to the United States Attorney by any appeal board and any file so forwarded shall be returned, unless in the 'Minutes of Action by Local Board and Appeal Board' on the Classification Questionnaire (SSS Form No. 100) the record shows and the letter of transmittal states that the appeal board reviewed the file and determined that the registrant should not be classified in either Class I-A-O or Class I-O under the circumstances set forth in subparagraphs (2) or (4) of paragraph (a) of this section.

"(c) The Department of Justice shall thereupon make an inquiry and hold a hearing on the character and good faith of the conscientious objections of the registrant. The registrant shall be notified of the time and place of such hearing and shall have an opportunity to be heard. If the objections of the registrant are found to be sustained, the Department of Justice shall recommend to the appeal board

(1) that if the registrant is inducted into the armed forces, he shall be assigned to noncombatant service, or (2) that if the registrant is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of induction be ordered by his local board to perform for a period of twenty-four consecutive months civilian work contributing to the maintenance of the national health, safety, or interest. If the Department of Justice finds that the objections of the registrant are not sustained, it shall recommend to the appeal board that such objections be not sustained.

"(d) Upon receipt of the report of the Department of Justice, the appeal board shall determine the classification of the registrant, and in its determination it shall give consideration to, but it shall not be bound to follow, the recommendation of the Department of Justice. The appeal board shall place in the Cover Sheet (SSS Form No. 101) of the registrant both the letter containing the recommendation of the Department of Justice and the report of the Hearing Officer of the Department of Justice."

Section 1626.26 of the Selective Service Regulations (32 C. F. R. § 1626.26 (1951 Rev.)) provides:

"*Decision of Appeal Board.*—(a) The appeal board shall classify the registrant, giving consideration to the various classes in the same manner in which the local board gives consideration thereto when it classifies a registrant, except that an appeal board may not place a registrant in Class IV-F because of physical or mental disability unless the registrant has been found by the local board or the armed forces to be disqualified for any military service because of physical or mental disability.

"(b) Such classification of the registrant shall be final, except where an appeal to the President is taken; provided, that this shall not be construed as prohibiting a local board from changing the classification of a registrant in a proper case under the provisions of part 1625 of this chapter."